

VII. COMPARABLE REGULATORY GROUND RULES SHOULD APPLY TO EXISTING AND PROPOSED LICENSED PCS SERVICES

In its *Notice*, the Commission correctly identifies the regulatory classification of 2 GHz PCS licensees as "one of the most important issues" to be addressed in this proceeding.⁶⁶ Significant regulatory differences exist between traditional common carrier and private land mobile radio services. The regulatory status of 2 GHz PCS providers will therefore greatly influence competition within the PCS marketplace as a whole, which includes existing mobile carriers subject to common carrier regulation.

As discussed below, the *Notice* explicitly authorizes cellular carriers to provide PCS on their cellular frequencies. Under the Commission's current rules, however, all of a cellular carrier's radio services must be provided on a common carrier basis. Consequently, clear disparities will result if new 2 GHz PCS providers are regulated as private carriers. Unable to tailor specialized services to the unique needs of specific users, cellular carriers would be at a significant disadvantage. In order to maximize the benefits of competition and avoid significant market distortions, McCaw believes that the Commission must act to ensure that all new and existing participants are afforded comparable treatment.

⁶⁶ *Notice* at ¶94.

**A. PRIVATE CARRIER STATUS FOR NEW LICENSED PCS SERVICES
WOULD CREATE REGULATORY DISPARITIES WITH EXISTING
COMMON CARRIER CELLULAR SERVICES**

McCaw has a fundamental problem with regulating new PCS providers as private carriers. It is clear that these entities will be competing against "the wide range of radio-based services currently offered: cellular services, specialized mobile radio services, paging services, wireless in-building services, cordless phones, and others."⁶⁷ If all of these services were on an equal regulatory footing, such competition would benefit the public through the availability of a greater range of diverse services at lower prices.

This scenario is radically altered, however, when new PCS participants are able to offer service on a private carrier basis but existing cellular carriers are not. The following regulatory disparities arise, creating a distinct competitive edge for the former in designing service plans:

- ***State Regulation.*** Private carriers are exempt from state regulation under Section 332 of the Communications Act, unless reselling interconnected telephone service for profit.⁶⁸ Common carriers, on the other hand, are subject to costly and stultifying regulation of rates, terms, and conditions of service by some states. Clearly, a new PCS provider licensed as a private carrier has an advantage -- notice of a common carrier's prices as well as the ability to make individualized decisions regarding rates. Cellular carriers, bound to tariffed rates, are limited in their ability to rapidly respond to market conditions.
- ***Federal Title II Regulation of Service Offerings.*** Because private carriers are not subject to Title II mandates, private carriers may arbitrarily serve or refuse service to any eligible users and indiscriminately price services. This accords them a great deal of flexibility in face-to-face negotiations and the ability to undercut common

⁶⁷ Notice at ¶94.

⁶⁸ 47 U.S.C. § 332 (1989).

carriers' rates to attract the most desirable customers. Common carriers, in contrast, have very little ability to structure offerings for individual customers or offer a customer rate advantages based on the customer's particular needs. Private carriers may also deny service to resellers. Common carriers, in contrast, are in some situations required to provide capacity and a profit margin to resale carriers competing for their customers.

- ***Federal Title II Regulation of Alien Ownership.*** Private carriers are not subject to ownership limitations contained in Section 310 of the Communications Act.⁶⁹ Accordingly, private carriers are free to seek foreign investment in order to raise capital for new infrastructure and services.

This list is not all-inclusive. Furthermore, the Commission has proposed to create a class of "super private carriers" for PCS, affording them the same interconnection rights as common carriers while maintaining private carrier regulation. Obviously, the contemplated reorganization of the rights and obligations imposed on existing and new PCS participants can impede full, fair and effective competition.

B. THE NOTICE'S PROPOSED EXPANDED CELLULAR SERVICE OPTION RELIEF IS ILLUSORY

The Commission is aware of the negative consequences of regulating PCS as private carriage without revising current cellular regulation. To further its intention "to foster a market environment in which cellular and PCS licensees compete with a variety of telecommunications services" and "to allow cellular carriers to respond more effectively to competition from PCS providers," the *Notice* proposes modifications to the Commission's cellular rules.⁷⁰ In particular, the Commission proposes to: (1) authorize the provision of

⁶⁹ 47 U.S.C. § 310 (1989).

⁷⁰ *Notice* at ¶70.

PCS services by cellular carriers; (2) remove the AMPS requirement; and, (3) eliminate the BOC separate subsidiary requirement. As discussed below, however, these proposed measures do not significantly add to cellular carrier's competitive flexibility, and the most critical aspect of regulatory relief needed -- the *Cellular Flexibility Petition* -- is deferred for later action.⁷¹

Explicit PCS Authority for Cellular Carriers. McCaw commends the Commission's efforts to address the problem of regulatory disparity by explicitly authorizing cellular carriers to provide PCS services, but it believes that the proposed solution is illusory. Cellular carriers are already able to provide PCS services. Indeed, McCaw has long regarded itself not as a paging or a cellular company alone but as a personal communications company. As Craig O. McCaw, Chairman of McCaw, explained at the FCC's *En Banc* Hearing on PCS, McCaw has invested in a variety of complementary radio-based services in pursuit of its vision of an advanced nationwide wireless network, becoming one of the nation's leading providers of PCS.⁷²

Far from increasing cellular carriers' ability to compete, the *Notice* succeeds only in giving cellular carriers something they already have. The real issue is ignored. Without meaningful rule changes, such as those proposed in the *Cellular Flexibility Petition*, cellular carriers must continue to offer their PCS services on a common carrier basis and, as such,

⁷¹ *Petition for Rulemaking by Telocator To Amend the Commission's Rules To Authorize Cellular Carriers To Offer Auxiliary and Non-Common Carrier Services*, RM-7823 (Sept. 4, 1991) [*"Cellular Flexibility Petition"*].

⁷² *See Written Testimony of Craig O. McCaw, Chairman of McCaw Cellular Communications, Inc.*, FCC PCS *En Banc* Hearing (Dec. 5, 1991), *filed in* GEN. Docket No. 90-314 (Nov. 21, 1991).

they are subject to extensive state and federal regulations. Newly authorized PCS service providers would, as private carriers, be free to offer or deny service arbitrarily and price indiscriminately.

Deletion of the AMPS Requirement. The *Notice* also inquires as to the advisability of removing the AMPS requirement. As a practical matter, cellular carriers are committed to providing analog service. Through AMPS service, cellular carriers have built strong customer bases that cannot now be ignored. In addition, such offerings continue to be the key to the development of a successful nationwide network. Thus, in reality this constraint must remain in place.⁷³

Elimination of Separate Subsidiary Requirements. Finally, the *Notice* entertains the idea of further "liberalizing" the cellular rules through the elimination of the BOC separate subsidiary requirement.⁷⁴ This relief is meaningless to McCaw and all other non-BOC cellular carriers, and quite possibly even to BOC carriers who might prefer to forego potential economies of scope in the interest of guarding against cross-subsidy and discrimination problems.

C. NEEDED SUBSTANTIVE RELIEF IN THE CELLULAR FLEXIBILITY PETITION IS DEFERRED

The sum of the Commission's proposals yields little additional flexibility to cellular licensees, and more substantive steps must be taken in order to achieve regulatory parity.

⁷³ See also Section IV(A)(3).

⁷⁴ *Notice* at ¶16.

The most obvious is prompt Commission action on the *Cellular Flexibility Petition*, which requests expansion of the flexible cellular service option to permit cellular licensees to provide auxiliary and non-common carrier services. Specifically, the *Cellular Flexibility Petition* proposes modification of the Commission's rules in accordance with the following principles:

- Amendment of Section 22.930 and other relevant rules to allow cellular licensees to provide non-common carrier services under the Cellular Service Option.⁷⁵
- Cellular licensees would be required to ensure the availability of sufficient capacity to meet the needs of common carrier subscribers.
- Auxiliary non-common carrier services would comply with Section 22.930 requirements to prevent interference and ensure technical compatibility with cellular services.⁷⁶
- Non-common carrier services offered pursuant to the Cellular Service Option would be considered private land mobile radio services for purposes of Section 332 of the Communications Act if provided without resale of interconnected exchange telephone service.

As the *Cellular Flexibility Petition* compellingly explains, the increased flexibility for cellular licensees would serve the public interest in a number of respects. The petition's proposals would permit the deployment of new telecommunications services while ensuring the continued availability of high quality and advanced cellular services, granting the consumer a wide array of choices. Moreover, the rule changes would increase efficiency in the utilization of spectrum. Finally, adoption of the proposals contained in the *Cellular*

⁷⁵ 47 C.F.R. § 22.930 (1991).

⁷⁶ *Id.*

Flexibility Petition would facilitate the Commission's efforts to promote a pro-competitive marketplace for mobile telecommunications services.

McCaw supports the *Cellular Flexibility Petition* as an important first step in enhancing PCS competition. Surprisingly, the Commission defers consideration of the real relief contained in the *Cellular Flexibility Petition*,⁷⁷ even while citing the *Notice* and its weak measures as justification for the elimination of SMR end user licensing requirements.⁷⁸ The Commission can no longer afford to delay -- it must act to remove regulatory barriers to full cellular competition in the PCS marketplace.

D. NEW PCS ENTRANTS SUCH AS CABLE COMPANIES WOULD BE FREE TO DENY ACCESS TO OR USE OF THEIR WIRELESS AND WIRELINE INFRASTRUCTURES

These regulatory disparities potentially arising from the *Notice* proposals for PCS regulation are also troubling because new PCS licensees may assemble and control nationwide wireless infrastructures and would be free to deny access to or use of their facilities, unlike common carriers. This discrepancy will further compound the inequities that flow from the application of two different regulatory frameworks to competing services. It is wholly anomalous to require cellular carriers to provide resale rights to their PCS competitors, when those same competitors are free from any similar regulation. Parity of regulation must be addressed in establishing a PCS infrastructure for the future.

⁷⁷ *Notice* at ¶70 n.49.

⁷⁸ *Amendment of Part 90 of the Commission's Rules To Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems* at ¶6 n.11, FCC 92-359 (Aug. 31, 1992).

Cable operators, in particular, highlight these issues. Although the Commission proposes to allow cable operators full rights to utilize their networks to provide PCS services, cable operators, unlike LECs, are free from interconnection obligations. But, at the same time, these operators may have valuable pole attachment and conduit rights that flow from their status as cable companies. Indeed, cable operators are positioned to cross-subsidize PCS services through marking up cable rates for their near captive cable subscribers.

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In light of these concerns, the Commission should seize this occasion to ensure regulatory parity. All mobile providers, whether new entrants or existing carriers, should be permitted to compete subject to the same regulatory ground rules. In particular, absent effective relief for cellular carriers, private carriage status for new providers would severely distort competition. And, the only means of providing adequate relief for cellular carriers has been deferred. Regulatory parity is a paramount issue that must be resolved prior to licensing new mobile carriers.

VIII. CONCLUSION

The allocations, rules, and policies adopted in this rulemaking will govern the next phase in the transformation of America's wired network into a wireless telecommunications infrastructure. Wisely, the Commission has elected to allow competition and flexible provision of service to play a large role in the way that services will be offered to the public,

and outlined a regulatory structure generally designed to promote ubiquity, speed of deployment, diversity of service, and competitive delivery. While McCaw concurs that the fundamental regulatory underpinning advanced in the *Notice* is sound, McCaw has suggested some areas where the *Notice* proposals depart from the values identified by the Commission.

In particular, McCaw believes the Commission should modify the proposals in the *Notice* to:

- Maximize entry opportunities by allocating the 1910-1930 MHz band for unlicensed PCS devices and utilizing the remainder of the 1850-1990 MHz band to authorize at least 5 licensed PCS allocations and one reserve allocation of 20 MHz;
- License PCS services utilizing MSA and RSA divisions as best reflecting the localized nature of PCS services;
- Avoid placing any restrictions on the ability of cellular licensees to take advantage of new PCS spectrum opportunities;
- Ensure the selection of qualified applicants through anti-speculation requirements, anti-trafficking restrictions, and licensing reforms;
- Allow the industry to evolve technical standards as the need arises; and
- Achieve regulatory parity for all existing and prospective providers of PCS services.

With these modifications, McCaw believes the Commission will assure the prompt delivery of a broad menu of low cost, high quality PCS services for the public now and in the future.

Respectfully submitted,

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